

“2004 EU Accession” as a Founding Moment? Of lost opportunities, alienating constitutionalism and vigilant courts

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The accession of ten Central and Eastern Europe (CEE) countries to the EU in 2004 must be seen as a Founding Moment that set off profound changes in the societal structures and constitutional narratives in these states. We should see the process of constitutional change as a continuity, rather than one on/off event. 2004 Accession must be analyzed through the prism of the events in 1989 and the fall of the Iron Curtain. The 2004 Accession was both conditioned by and inextricably linked to the true Constitutional Moment of 1989 when the former Soviet satellites shook off the yoke of totalitarian regime and the negotiated transformation ensued. As important as the 2004 Founding Moment was, it was limited in scope to the legal constitutionalism defined by the institutions, technocratic legalese, fundamental rights and the rule of law^[1]. True culture of constitutionalism never had a chance to spring from these transformative institutional and systemic changes, and the constitutional moment was never translated into a “*We the people*” and long-lasting societal mobilization.

The dark side of the 2004 Founding Moment

How to create a constitutional culture that would truly underpin and entrench the change taking place at the level of a constitutional text? CEE elites never bothered to answer this question in any meaningful way. The sins of the past omissions are catching up with us now. With the benefit of hindsight one might argue that the prevalent top-down and live-in-the-moment approach, coupled with extreme legalism that excludes popular participation, are the reasons for the weak popular attachment to the constitutional structures, procedures and mechanisms in CEE countries.

Civic disenfranchisement and passivity followed and today they, rather than a short-lived feeling of public engagement, define the citizenry in CEE countries. When asked today, an average CEE citizen would respond: “*the choices made back then were not mine, but rather result of elite-driven process*”. The tragic consequences of this “*alienating constitutionalism*” that prevailed post-1989 are now becoming more evident with the constitutional crises in the CEE^[2].

With the current dismantling of the Polish Constitutional Court (and earlier court-packing in Hungary and Romania), the civil society in Poland is all of a sudden asked, and expected, to rise up in arms and show its more engaged face. However, the name of the game is not the engagement, but cynicism: “*as long as the economy is fine, why should we care for the Constitutional Court*”.

“*Let’s stand up for the Court*” hardly gets any traction. As much as the liberal elites are appalled by the ruthlessness of the attack on the Court and the Polish rule of law, they are the ones to be blamed for the civic passivity that continues to define post-transition societies in general. The truly reformative potential of 1989, and then 2004, was lost when elites neglected the importance of connecting with the “real” people beyond the magic of the big-bang moments of 1989 and 2004.

Right now with the Polish society slowly awakening and first signs of the grass-roots constitutionalism, the

challenge is clear. We are entering *terra incognita* as the citizenry is faced for the first time with a tall order of bottom-up and not top-down mobilization. Today nobody (at least in Poland) really knows how 25 years of dominant top-down transformation affected “the bottom” and whether “the bottom” is ready to organize itself and defend the structures and ideas which so far have been a distant and alien concepts. Indeed, the question which expresses this popular sentiment of disengagement, recurs: “*why should we die for ‘their’* (my emphasis) *constitutional court*”. This „*alienating constitutionalism*“ is one of the dark sides of 2004 Founding Moment, one that nobody really saw coming at the time of the EU Accession.

Now on to the slightly brighter legacy of the 2004 Founding Moment.

What kind of a constitutional court?

In 2004 *the West* (defined by post-national constellation and now *en vogue* transnational constitutionalism) met *the East* (firm believer in the Westphalian constitutionalism with the unitary concept of sovereignty). The West encountered freedom-hungry and rightly proud Eastern Europe countries unable to accept that the cherished sovereignty of a nation state is now to be given up to cosmopolitan and plural “sovereignty in participation”.

The clash of constitutional narratives was thus unavoidable, and yet in 2004 the celebratory mood prevailed. The 2004 Accession called for a new model of constitutional adjudication for CEE Constitutional Courts which would allow them not only to keep up with the consequences of the Moment and its divergent dialectics, but also to exert influence on the dynamics of constitutional change post-2004.

The legacy of 2004 Founding Moment should be seen in the necessity to rethink tenets of traditional static constitutionalism which are firmly rooted in Eastern Europe. In the XXI century constitutional courts are not only ambassadors of their respective legal orders, but become powerful political players involved in *mega-politics* understood as core political controversies that define (and often divide) whole polities^[3].

In the wake of EU Accession a good constitutional court not only criticizes, supervises and defends its constitution against the external pressures, but also learns how to defer and make its constitutional document part of the European constitution-building. The concept of “*vigilant constitutionalism*” is premised on an important shift in emphasis from “*judges asking judges*”^[4] to (vigilant) “*judges monitoring judges*”.

“*Vigilant constitutionalism*” moves these courts away from a *hierarchy* (good from an internal perspective) towards *heterarchy* and discursive engagement. It calls on them to voice their concerns within the procedural and institutional framework of EU law, rather than simply retreat behind constitutional lines.

2004 and beyond

For the time being, CEE constitutional courts only started unpacking the complexity of constitutional change (*moment!*) which happened in 2004. At least for Poland and its battered Constitutional Court, the full encounter and dialogue might be put on hold (if not reversed for good) for the foreseeable future ... unless the “forgotten citizenry” somehow manages to find and establish its voice that was never really regained in 1989. Should the citizenry start embracing and defending the Court as „*my own*“, the truly powerful legacy of the 2004 Founding Moment would be discovered.

^[1] P. Blokker, *New Democracies in Crisis. A Comparative Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2014.

^[2] For more general analysis see I. Krastev, *The Strange Death of Liberal Consensus*, (2007) 18 Journal of Democracy 56.

[3] R. Hirschl, *The Judicialization of Politics*, in G. A. Caldeira, R. D. Keleman, K. E. Whittington, (eds), *The Oxford Handbook of Law and Politics*, 2008.

[4] One of the cornerstones of EU system of judicial protection by the ordinary courts.

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